EON Bank Bhd v Deb Brata Das Gupta & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–900 OF 1998
KAMALANATHAN RATNAM J
3 AUGUST 1999

Land Law *— Charge — Order for sale — Whether cause to the contrary arose if there was no specific prayer for amount due under charge — Whether reserve price must be stated in prayer — National Land Code 1965 s 257(1), (2)*

The plaintiff commenced foreclosure proceedings and also demanded for vacant possession of a piece of land charged by the defendants to the plaintiff as security for an overdraft facility granted to the first defendant. The defendants argued that cause to the contrary arose as there was no specific prayer for the amount due under the charge which the defendants had to pay, thus breaching s 257(1)(c) of the National Land Code 1965 ('NLC'). Further, the plaintiff's prayer only referred to the reserve price without elaborating the meaning of the reserve price as 'being a price equal to the estimated market value of the land or lease in question' in accordance with s 257(1)(d) and the word 'shall' in s 257(1) makes it a mandatory requirement to do so. To this, the plaintiff requested that the judge exercise his discretion under s 257(2) and directed the senior assistant registrar to fix a reserve price to comply with the omitted words.

Held, allowing the plaintiff's application:

(1) The plaintiff had in prayer 3 of the originating summons clearly asked for the sum of RM3,594,354.79 due as at 17 September 1998 upon the charge. This was the date the originating summons and the affidavit in support were filed. By way of a further affidavit, the plaintiff has stated the exact sum due as on 14 June 1999, that was, the date which the originating summons was heard and the exact sum claimed was RM3,858,679.81. The originating summons cannot be heard and disposed of on the first return date endorsed on the originating summons. Once the originating summons is served, the defendants will invariably ask for time to file a reply. There might be further counter-affidavits. Hence the need for the plaintiff to file a final affidavit to ensure that it claims the exact sum on the date of the actual hearing; and this, the plaintiff had clearly done (see p 719C–E).

(2) As for the omission of the words describing the reserve price, the omission of the words was not fatal; what is relevant is that there was to be a reserve price, and surely there must be a basis to fix a reserve price which is found in sub-cl (d). The court directed the senior assistant registrar to fix a reserve price to comply with the omitted words (see p 720E).

A **[Bahasa Malaysia summary**

Plaintif telah memulakan prosiding perampasan dan juga menuntut milikan kosong sebidang tanah yang digadaikan oleh defendan-defendan kepada plaintif-plaintif sebagai jaminan kemudahan overdraf kepada defendan pertama. Defendan-defendan menghujah-
B kan bahawa sebab-sebab di sebaliknya timbul kerana tiada permohonan khusus tentang jumlah yang perlu dibayar di bawah gadaian itu di mana defendan-defendan perlu membuat pembayaran, dan dengan itu melanggar s 257(1)(c) Kanun Tanah Negara 1965 ('KTN itu'). Selanjutnya, permohonan plaintif hanya merujuk kepada
C harga simpanan tanpa menerangkan dengan lebih terperinci maksud harga simpanan sebagai 'harga yang sama dengan anggaran nilai pasaran tanah atau pajakan yang dipersoalkan' menurut s 257(1)(d) dan perkataan 'hendaklah' di dalam s 257(1) merupakan keperluan mandatori untuk berbuat demikian. Dengan ini, plaintif memohon agar hakim menjalankan budi bicara beliau di bawah s 257(2) dan
D mengarahkan penolong kanan pendaftar untuk menetapkan suatu harga simpanan untuk mematuhi perkataan-perkataan yang ditinggalkan.

Diputuskan, membenarkan permohonan plaintif tersebut:

E (1) Plaintif telah di dalam permohonan 3 di dalam saman pemula dengan jelas meminta sejumlah RM3,594,354.79 yang perlu dibayar setakat 17 September 1998 terhadap gadaian itu. Inilah tarikh saman pemula dan afidavit sokongan telah difailkan. Melalui satu afidavit yang lain, plaintif telah menyatakan jumlah
F sebenar yang perlu dibayar setakat 14 Jun 1999, iaitu, tarikh di mana saman pemula itu didengar dan jumlah sebenar yang dituntut adalah RM3,858,679.81. Saman pemula itu tidak dapat didengar dan diselesaikan pada tarikh pemulangan pertama yang diindorskan pada saman pemula itu. Setelah saman pemula itu diserahkan, defendan-defendan akan selalunya meminta masa
G untuk memfailkan jawapan. Mungkin terdapat afidavit-afidavit balasan yang selanjutnya. Justeru itu keperluan untuk plaintif memfailkan satu afidavit terakhir bagi memastikan bahawa ia menuntut jumlah sebenar pada tarikh sebenar perbicaraan; dan ini, telah pun dengan jelas dibuat oleh plaintif (lihat ms 719C–E).

H (2) Berhubung dengan ketinggalan perkataan-perkataan yang menerangkan harga simpanan itu, ketinggalan perkataan-perkataan tersebut bukanlah memudaratkan; apa yang relevan adalah perlunya suatu harga simpanan, dan semestinya terdapat dasar untuk menetapkan suatu harga simpanan yang wujud di dalam sub-kecil (d). Mahkamah telah mengarahkan penolong
I kanan pendaftar untuk menetapkan suatu harga simpanan untuk mematuhi perkataan-perkataan yang tidak ditinggalkan (lihat ms 720E).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

Cases referred to

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)
Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (refd)
Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd [1999] 1 CLJ 810 (refd)
Perwira Affin Bank Bhd v Tan Sian Ser [1995] 2 CLJ 133 (refd)

Legislation referred to

National Land Code 1965 ss 254, 257(1)(c), (d), (2)
Rules of the High Court 1980 O 83 r 3(3), (6), (7)

Kenneth Goh (*S Shanti* with him) (*NK Tan & Rahim*) for the plaintiff.
Amarjeet Singh (Zubeda & Amarjeet) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

The plaintiff's case

The defendants are the registered owners of land held under Title HS(D) 31930, PT No 703, in the Mukim of Kuala Lumpur ('the said property').

In respect of an overdraft facility of RM3.1m granted to the first defendant by the plaintiff at the defendants' request the defendants charged the said property to the plaintiff. It was a term, inter alia, of the facility agreement entered into by the plaintiff and the defendants that the defendants would pay to the plaintiff all interests that became due and payable pursuant to the said facility agreement. It was also a term of the said facility agreement that in the event of default by the defendants on any of the terms and conditions of the facility agreement and the charge the plaintiff was at liberty to issue out the notice of default with respect to a charge pursuant to s 254 of the National Land Code 1965 ('NLC') in compliance with Form 16D.

It is a fact that the defendants had defaulted in the repayments of the overdraft facility or the interest accrued. By way of a registered notice of demand dated 4 December 1997 the plaintiff demanded payment from the defendants the sum of RM3,243,045.39 calculated as at 30 November 1997 together with the default interest thereon at the rate of 12.35% pa from 1 December 1997 till the date of full realization. There was also a demand for vacant possession of the said property. By way of the formal Form 16D notice dated 22 December 1997 the plaintiff demanded of the defendants the sum of RM3,243,045.39 calculated as at 30 November 1997 being the outstanding sum due and owing under the facility

A agreement granted to the first defendant. Payment was to have been made within seven days from the date of service of the said statutory notice. As of 17 September 1998, that is, the day encl 2, namely, the affidavit in support of encl 1, was affirmed, the plaintiff has averred that the outstanding sum was RM3,594,354.79.

B Order 83 r 3(3), (6) and (7) of the Rules of the High Court 1980 ('RHC') read as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any case or class otherwise directs, the state of the account between the chargor and the chargee with particulars of —
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> C
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> (a) the amount of the advance;
> (b) the amount of the repayments;
> (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
> (d) the amount remaining due under the charge.
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> D ...
>
> (6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).
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> (7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

E In compliance with the above referred rules the plaintiff particularized the details in encl 2. As of the date of the hearing of the originating summons, namely, 14 June 1999, the plaintiffs affidavit (encl 11) stated that the outstanding amount due was RM3,858,679.81 with interest at 8.50% pa calculated on daily rest on the principal sum of RM3.1m and on the F accumulated interest of RM758,679.81 the interest was at 9.50% pa also calculated on daily rest. The plaintiff again proceeded to give the details pursuant to O 83 r 3(3), (6) and (7) of the RHC.

The claim

G The plaintiff prayed for the following orders:

(1) That the said property be sold by way of public auction in order for the plaintiff to recover the sum due to it under the charge.

(2) That a date for the public auction be fixed.

(3) That the senior assistant registrar ('SAR') do fix a reserve price for the H said property and for further orders relating to the sale by public auction.

(4) That the defendants do give vacant possession of the said land within seven days from the date of the order of the court.

(5) That the plaintiff be at liberty to make an offer during the public I auction and if successful to be allowed to settle the amount due to the defendants from the amount outstanding and due to the plaintiff by the defendants.

(6) That the defendants be liable for all costs including the costs of the auction.

(7) That the plaintiff be allowed such further relief that the court deems fit and proper.

Preliminary objection of the defendants

The defendants raised a preliminary objection and relied on encl 5 which is an affidavit affirmed by the first defendant on his behalf and on behalf of the second defendant. However, in his oral submission, Mr Amarjeet Singh only raised one issue as stated in para 4 of the said affidavit. He argued that since the affidavit in support of the originating summons (encl 2) was bundled together with the originating summons (encl 1), it must necessarily mean that the affidavit must have been affirmed before the originating summons was filed. To a question by the court if this was his assumption, he answered in the affirmative. He therefore contended that when the affidavit was affirmed, there was no cause of action registered in the court. I summarily dismissed this objection and did not even require the plaintiff to respond. The very fact that both the affidavit in support and the application (the originating summons) were bound together clearly indicated that the plaintiff had intended that both the documents were to be read together. Since both documents were filed on 17 September 1998, and since even the affidavit was affirmed on 17 September 1998, there is no evidence before me, other than the admitted assumption of the defendants that the affidavit was affirmed before the originating summons was filed. In any case, the plaintiff through its branch manager had denied this assumption in his affidavit (encl 8).

Findings of the court

Breach of s 257(1)(c) and (d)

The defendants contended that the plaintiff had breached s 257(1)(c) and (d) of the NLC as giving rise to 'a cause to the contrary'. Section 257 reads as follows:

> 257 (1) Every order for sale made by the Court under section 256 shall —
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> (a) provide for the sale to be by public auction;
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> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
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> (c) specify the total amount due to the chargee at the date on which the order is made; and
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> (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.
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> (2) Any such order may contain such other directions with respect to the sale as the Court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or leases than one, direct —

A (a) that they be offered for sale individually, and in a specified order; and

(b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the Registrar of the Court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.

(3) In specifying or determining any amount for the purposes of paragraph (b) of sub-section (2), the Court or the Registrar, as the case may be, shall have regard not only to the liability of the chargor under the charge, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

Mr Amarjeet Singh argued that since there is no specific prayer asking for the amount due under the charge that the defendants have to pay, there was a breach of s 257(1)(c). This submission is groundless. The plaintiff had in prayer (3) of the originating summons clearly asked for the sum of RM3,594,354.79 due as at 17 September 1998 upon the said charge. This was the date the originating summons and the affidavit in support were filed. By way of encl 11 (a further affidavit) the plaintiff has stated the exact sum due as on 14 June 1999, that is, the date I heard the originating summons and the exact sum claimed is RM3,858,679.81. Surely it is common knowledge that the originating summons cannot be heard and disposed of on the first return date endorsed on the originating summons. Once the originating summons is served the defendants invariably ask for time to file a reply. There might be further counter-affidavits. Hence the need for the plaintiff to file a final affidavit to ensure that it claims the exact sum on the date of the actual hearing; and this, the plaintiff has clearly done. The first 'cause to the contrary' did not even make it to the starting block.

The next 'cause to the contrary' in the opinion of the defendants is the alleged breach of s 257(1)(d). The defendants argued that since prayer (3) of the originating summons merely referred to the reserve price and did not elaborate the meaning of the reserve price as stated in sub-s (d) 'being a price equal to the estimated market value of the land or lease in question', the omission of such words was fatal to the plaintiff's claim. The defendants argued that the word 'shall' as stated in s 257(1) gives it a mandatory requirement. I was referred to *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 (SC) where the then Supreme Court held that the provisions of s 257(1)(a)–(d) of the NLC were mandatory. In that case the court had failed to fix a date for the public auction and had also failed to stipulate the amount actually due under the charge.

In the case before me the plaintiff specifically prayed for an auction date. Whilst I had given an order in terms of prayer (2), I had omitted to fix an auction date. In *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd* [1999] 1 CLJ 810 I had, upon review granted the plaintiff's application to fix an auction date. I held in that case that the court has to determine whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it

was due to an accidental slip or omission. In that particular case the error arose out of counsel's omission to ask for a specific date although he had prayed for an order that a date be set not less than one month from the date the order for sale was made. In this case since not even the draft order has been filed, I shall exercise my discretion under the slip rule and include an amendment to prayer (2) and fix the auction date in September. As for the omission of the words describing the reserve price, I had also in the cause of the hearing acceded to the plaintiff's request to exercise my discretion under s 257(2) and directed the SAR to fix a reserve price to comply with the omitted words. To my mind the omission of the words is not fatal; what is relevant is that there was to be a reserve price, and surely there must be a basis to fix a reserve price and that basis must be found in sub-cl (d).

The next 'cause to the contrary' as raised by the defendants relates to the plaintiff's reliance on O 83 of the RHC instead of the provision under s 271 of the NLC which deals with recovery of vacant possession. As for this presumed conflict of judicial opinion as to the applicability of the provisions of O 83 r 3 of the RHC to an application for an order seeking enforcement of a charge registered under the NLC by way of an order of sale, the Supreme Court in *Maimunah* preferred the decision of Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 to that of Abdul Aziz bin Mohamad J in *Perwira Affin Bank Bhd v Tan Sian Ser* [1995] 2 CLJ 133.

Abdul Aziz bin Mohamad J was of the view that the treatment of an application for an order for sale must necessarily be different from that of an action for the payment of moneys secured by the charge because the conditions for the success of an application for an order for sale are subject to the NLC whereas the conditions for the success of an auction for payment of moneys secured by the charge are not. His Lordship therefore expressed the view that recovery for vacant possession must be dealt with under ss 270 to 277 of the NLC. Shankar J however saw no conflict between the provisions of O 83 r 3 of the RHC and s 257(1)(c) of the NLC.

In any case it is the plaintiff's submission before me that it is relying on O 83 r 3 of the RHC. In all the circumstances, therefore, I granted the plaintiff order in terms of prayers (1), (2), (3), (4), (5) and (6). As for prayer (2) I have since fixed the date of auction as 30 September 1999. As for prayer (3) I had directed that in fixing the reserve price the SAR do comply with the meaning attributed to reserve price, as stated in s 257(1)(d) of the NLC.

Plaintiff's application allowed.

Reported by Chin En Tek